No. 87-645

In the Supreme Court of the United States

OCTOBER TERM, 1987

F. CLARK HUFFMAN, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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In our petition we demonstrated that the court of appeals seriously misconstrued 42 U.S.C. 2201(v) (§ 161(v) of the Atomic Energy Act of 1954), and that the consequences of this ruling—harm to American utilities and their customers, harm to the Department of Energy (DOE), and harm to American foreign and trade policy—make this case important and worthy of this Court's review. Respondents vigorously debate our contentions about the correct meaning of the statute. Their arguments, however, do not rehabilitate the court of appeals' erroneous holding. Moreover, respondents make no effort to dispute the practical importance of the case.

1. a. The court of appeals held (Pet. App. 17a-18a) that DOE must halt the enrichment of foreign-source uranium whenever the domestic uranium industry is not viable, even if such restrictions would do nothing to assure the industry's viability. As we explained in the petition, the statute does not say this. It says that restrictions must be imposed "to the extent necessary to assure the maintenance of a viable domestic industry" (§ 2201(v)).

We do not dispute that the purpose of Section 2201(v) is to maintain a viable domestic uranium industry (see Pet. 4-5); nor do we claim that DOE can ignore the statute's requirements. It is the court of appeals and respondents who would ignore the explicit purpose of the statute when they insist that restrictions on enrichment of foreign-source uranium be imposed whether or not they would serve the stated statutory purpose.

b. As we explained in the petition, DOE's reading of the statute is at the very least a reasonable view of the language. Accordingly, the court of appeals was required under *Young* v. *Community Nutrition Inst.*, 476 U.S. 974 (1986), to accept that view and not substitute its own. Respondents claim that deference is not appropriate here because DOE has abandoned the statutory goal (Resp. Br. in Opp. (Opp.) 12). But the question is not whether DOE can ignore the statutory command—of course it cannot. Rather, the question is what that command is. The Secretary has adopted a reasonable construction of the statute, which is entitled to significant weight under this Court's cases. Nor has the agency shifted its position on this interpretative question (see Opp. 12); what has changed over time are the facts, including the domestic industry's viability and whether restrictions on enrichment of foreign uranium would effect that viability. To our knowledge neither the Atomic Energy Commission nor DOE has ever endorsed the court of appeals' position that restrictions must be imposed whenever the domestic industry is not viable, whatever the effects of such restrictions on viability might be.

2. a. In this Court, respondents have advanced (Opp. 13-15) a new theory of Section 2201(v), different from that adopted by the court of appeals. They urge that the word "necessary" is used in Section 2201(v) in the sense that contrasts with "sufficient." Presumably, this would mean that DOE must impose restrictions whenever they are a necessary condition of viability, even if *other* changes

outside the control of the agency (such as a dramatic increase in demand for uranium) would also be necessary before the domestic industry would be viable. This theory improves on the rationale of the court of appeals to the extent that it recognizes that the statute demands an inquiry into the actual effect of restrictions on viability. However, respondents' new interpretation will not support the judgment below. Neither the district court nor the court of appeals found or even asked whether restrictions on the enrichment of foreign uranium were a necessary condition of the viability of the industry. Instead, the courts below held that once the domestic industry is found to be not viable, restrictions on enrichment of foreign uranium must be imposed, no matter what contribution such restrictions might make toward reviving the domestic industry. Because the court of appeals' judgment cannot be sustained on the basis of respondents' theory, we will not discuss the merits of that interpretation.

b. Respondents further suggest that if enrichment restrictions were combined with action by the Nuclear Regulatory Commission (NRC) to deny licenses for the importation of special nuclear material under 42 U.S.C. 2073(a) or 2201(b), this might return the domestic uranium industry to viability (Opp. 14-15). But again,this was not the court of appeals' rationale, and the issues it raises have never been litigated in this case. The legal powers and duties of the NRC were not addressed by the courts below,[1] nor were the lower courts asked to consider

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[1] In our petition (at 8 n.5) we erroneously stated that 42 U.S.C. 2099 requires the NRC to limit licenses of enriched uranium ("special nuclear material") when such licenses "would be inimical to the common defense and security or the health and safety of the public." In fact, Section 2099 applies to the NRC's licensing of imported "source material"—unenriched uranium or thorium (see 42 U.S.C. 2014(*z*)). This error is not material to any of the issues presented in this case.

whether the total elimination of imported uranium from the domestic market—both source material and special nuclear material—would restore the domestic industry to viability.[2] Moreover, respondents have not at any prior stage of this litigation argued that the statute obliges DOE to petition the NRC to take steps to restrict imports, nor (to our knowledge) have respondents ever suggested this to the NRC.

3. a. The petition sets out the Secretary's views concerning the likely effect of restrictions on enrichment as developed in a rulemaking that commenced while this case was before the district court. Respondents suggest that the rulemaking is "merely a post hoc rationalization by the agency in support of its litigating position" (Opp. 12). The rulemaking, however, was a proper response to this lawsuit. Respondents' original filings in this case requested the district court to order DOE to conduct a rulemaking to establish criteria restricting the importation of foreign uranium (see July 10, 1985, Mem. in Support of Motion for Summary Judgment 25). DOE in effect granted the relief requested by respondents by initiating the rulemaking to revise the criteria under which enrichment services are offered (see 10 C.F.R. Pt. 762) and to address the question whether conditions in the domestic uranium industry required restrictions on enrichment of foreign uranium.

Although respondents now evidently disagree with a critical finding of the rulemaking—that restrictions will not assure a viable domestic uranium industry—their approach to this case so far has not been to argue that this finding is wrong. Rather, they have maintained that the effects of restrictions on domestic viability are legally irrele-

[2] The purpose of restrictions under Section 2201(v), it must be remembered, is the maintenance of a viable domestic uranium industry, not the provision of economic assistance to the industry that will nevertheless not make it viable (see Pet. 22 n.15).

vant once the industry is determined to be not viable. The district court agreed, and granted respondents' motion for summary judgment without making any inquiry into the underlying facts about what effect the imposition of restrictions would have on the industry's future viability. The court of appeals affirmed on the same basis. In challenging the rulings below, we have referred to the rulemaking in order to explain the Secretary's view of the facts about the state of the domestic uranium industry—facts which are highly relevant under the Secretary's interpretation of the statute, and which, if they had been put in issue in the courts below, could have been tested by appropriate adversarial proceedings. We have not, however, argued that the court of appeals was wrong because the Secretary's factual conclusions were right; the court of appeals was wrong either because it thought those facts were irrelevant (see Pet. 16-21) or because it felt entitled to disagree with them without reviewing them (*id.* at 21-23). This petition seeks correction of the court of appeals' errors of law, not an affirmation of the Secretary's hitherto unchallenged factual findings.

b. Respondents contend (Opp. 13) that, because of the continuing resolution that funded DOE for the fiscal year ending September 30, 1987 (Act of Oct. 18, 1986, Pub. L. No. 99-500, § 305, 100 Stat. 1783-209 to 1783-210), "DOE's July 1986 rulemaking cannot and should not be considered in resolving the issue presented in this case." Respondents misapprehend both the continuing resolution and the rulemaking's relevance. Section 305 of the continuing resolution provides in pertinent part that "no provision of *this joint resolution* or the *July 24, 1986, criteria* shall affect the merits of the legal position of any of the parties concerning the question[] whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in domestic utilization facilities * * *" (100 Stat. 1783-210

(emphasis added)). We have not relied upon any provision of the joint resolution or the 1986 criteria in support of our interpretation of Section 2201(v)—a statute enacted in 1964. We have simply cited the explanation accompanying the promulgation of the 1986 criteria as the most authoritative expression of the Secretary's views on the legal question here presented, and his assessment of ~~both~~ the likely effects of enrichment restrictions on the domestic industry. This is entirely in keeping with the continuing resolution.

4. a. The court of appeals acknowledged that "[t]his case raises important issues, the resolution of which will affect not only the parties involved * * * but also all utilities that use nuclear power as well as the eventual consumers who purchase power from such utilities" (Pet. App. 3a). Our petition (at 23-28) set forth the reasons why this case is important. Respondents do not challenge these assertions, and we will not repeat them except to say that this case unquestionably involves very large sums of money and highly sensitive questions of United States foreign trade, nuclear cooperation and nuclear nonproliferation policy. Indeed, the difficulties that this case poses for United States foreign relations are illustrated by the fact that the Governments of Australia and Canada have filed amicus briefs.[3]

b. Respondents imply (Opp. 9) that when a case involves only a question of statutory construction, and the deference due the agency, it cannot rise to the level of importance needed to invoke Supreme Court review. This

[3] We do not necessarily agree with all of the assertions in those briefs about the United States' obligations under international agreements and international law. The concern shown by Australia and Canada, however, and the issues they raise, demonstrate that this case implicates matters of utmost importance to some of our trading partners.

Court, however, has repeatedly granted certiorari to examine the standards a court should apply in reviewing an agency's interpretation of its own statute. See, *e.g.*, *Young* v. *Community Nutrition Inst.*, 476 U.S. 974 (1986); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *United States* v. *Rutherford*, 442 U.S. 544 (1979). Moreover, the Court has granted certiorari where the issues simply "concern the construction of a major federal statute" (*United States* v. *Donovan*, 429 U.S. 413, 422 (1977)), even where no conflict in the circuits had developed (*e.g.*, *Young* v. *Community Nutrition Inst.*, *supra*).[4]

c. Respondents also contend (Opp. 15-16 n.20) that pending legislation may moot this case. They refer to S. 1846, 100th Cong., 1st Sess. (1987), a bill that would, inter alia, eliminate Section 2201(v) while creating a government corporation to carry out the nation's enrichment business. The legislation, however, has not been passed by either the House or the Senate, and it remains highly speculative whether it or anything else on the subject will be enacted. Section 2201(v) remains in effect, and the Tenth Circuit's misreading of the statute will continue to impose severe adverse consequences for the United States as long as DOE is subject to it.

We agree with respondents that neither the adverse consequences of the judgment below nor anything else would be a basis for "disregarding the clear intent of Congress, as reflected in the language and history of the statute" (Opp. 15). The issue here is the meaning of Section 2201(v), not its wisdom. As we said in our petition (at 27-28), the policy

[4] As we explained in our petition (at 16 & n.13), the court of appeals' decision upholds what is in effect a nationwide injunction prohibiting DOE from any enrichment of foreign uranium. In these circumstances, it is highly unlikely that a circuit conflict would ever develop.

of Congress "must be followed until Congress changes it, whatever the consequences." We submit that the court of appeals' interpretation of that policy is sufficiently doubtful, and the adverse consequences of that ruling are sufficiently grave, that review by this Court is clearly warranted.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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